IN THE

# Supreme Court of the United States

OCTOBER TERM, 1954

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## No. 6

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B. CLINTON WATSON, ET UX
Appellants-Petitioners

VS.

EMPLOYERS LIABILITY ASSURANCE CORPORATION,
Appellee-Respondent

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## REPLY BRIEF ON BEHALF OF APPELLANTS-PETITIONERS

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### STATEMENT OF THE CASE

At pages 3 to 7, both inclusive, of their original brief filed with this Court, appellants- petitioners (hereinafter referred to as "Watsons" for brevity) detailed their statement of the case as they understand it.

In the brief of appellee-respondent (hereinafter referred to as "Employers" for brevity), it contends that the Watsons have "omitted or misstated certain essential facts" in their statement of the case as set forth in their original brief.

In order to show that the Watsons have neither omitted nor misstated any facts, and in order to point out both errors in fact and in law asserted in Employers' brief, both in its statement of the case and elsewhere in its brief, as will be detailed in other portions of this brief, this reply brief is respectfully submitted.

Our reply to Employers' brief will as far as possible, follow the sub-heads employed by Employers.

On page 7 of its brief Employers quotes Clause IV of the Insuring Agreements of the policy (R. 56) declaring that the policy applies to all accidents "occurring within the United States of America, its territories or possessions, Canada or Newfoundland." Employers then goes on to say in the next paragraph that Gillette and it specifically contracted with reference to Massachusetts law and that the quoted provision of the policy indicates that no insurance was extended to accidents occurring in Louisiana.

Since the policy itself provides that it does cover accidents in Louisiana and since the policy itself provides that all liability of Gillette in Louisiana is covered, it is impossible to square Employers' contention either that the policy did not cover in Louisiana or that it and Gillette contracted with reference to Massachusetts law.

Actually, and as a matter of fact, the parties to the contract of insurance contracted with respect to the laws of all 48 states of the Union, the laws of Canada and the laws of Newfoundland, since the policy was made operative in all of those places.

**History of Louisiana Direct Action Statute**

Under that portion of its brief directed to the history of the Louisiana direct action statute it is urged on page 11 of Employers' brief that the courts have rendered conflicting opinions as to the extraterritorial effect of the statutes under consideration and their predecessors, particularly Act 55 of 1930 of the Louisiana Statutes. In support of this contention the Louisiana case of *Lowery v. Zorn, 157 So. 826* is cited. This case was a decision by the Louisiana Court of Appeal, an intermediate court, and was specifically overruled by the Supreme Court of Louisiana in *Stephenson v. List Laundry & Dry Cleaners, 182 La. 383, 162 So. 19*, decided in 1935. The Stephenson case has been consistently followed thereafter by the Courts of Appeal, the first decision of those courts thereafter being *Robbins v. Short, 165 So. 512* where it was recognized at pages 514-515 that the holding in Lowery v. Zorn on this point was overruled by the Supreme Court.

The only other decision cited by Employers in this connection is *Wheat v. White, 38 F. Supp. 796*, which is a decision by a Federal District Court and as such has no value as precedent and establishes no authority for the interpretation of the questioned Louisiana statutes. Once the questioned statutes were established as procedural by the Louisiana Appellate Courts, the Federal Courts in that state concurred in this characterization until the present case and its companion ones arose subsequent to the passage of the 1950 statutes. See *Bouis v. Aetna Cas. & Surety Co., 91 F. Supp. 954*, and cases therein cited. In the Bouis case it is said:

> "It seems to be settled that these statutes do deal with procedure alone. The writer in 1932, in Hudson v. Georgia Casualty Co. et al, 57 F. 2d 757, followed the decisions of the state courts to that effect, and to some extent analyzed and rejected the claims of unconstitutionality under the Federal Constitution."

Likewise, under this heading, beginning at the bottom of page 12 of its brief and continuing on page 13 thereof, Employers argues that Louisiana has not and never has had any power to regulate insurance contracts entered into outside its jurisdiction even if such contracts are entered into by Louisiana citizens or cover risks within Louisiana.

This argument is at war with the decision of this Court in *Hoopeston Canning Company v. Cullen, 318 U.S. 313, 87 L. Ed. 777, 63 S. Ct. 602.* In that case the policies of insurance involved were not written in the State of New York, no payments of losses were made in New York, but the insured risks were in New York. This Court held that the statutes of New York, there under attack, regulating the foreign insurance corporation, were perfectly valid and the State of New York was well within its rights in regulating the contracts as applying to risks in New York because of the substantial contact with New York inherent in the insurance policies themselves.

Employers argues further that since Congress enacted the McCarran Act, 15 U.S.C. 1011-1015, the states could regulate insurance companies only to the extent that they could regulate them prior to the passage of that

Act in 1945 and from this premise contends that since the McCarran Act was enacted in 1945 and the subsequent statutes of Louisiana, under attack here, were enacted in 1950, necessarily the statutes cannot stand.

In the first place the State of Louisiana had the *power* to enact these statutes long before the McCarran Act was passed and in the second place it had *actually* exercised the power long before the McCarran Act was passed. In 1930, by the passage of Act 55 of that year, Louisiana enacted its first direct action statute. As interpreted by its Courts, specifically in *Robbins v. Short, 165 So. 512*, decided in 1936, the Louisiana Court held that the statute applied to policies written and delivered outside of Louisiana and extending coverage in Louisiana, as to accidents occurring in Louisiana. Robbins v. Short was decided in 1936, some 9 years before the passage of the McCarran Act. So it is seen that under the Act of 1930, as interpreted by the Louisiana Courts, Louisiana had actually exercised the power here asserted at least 9 years before the McCarran Act was passed. The Acts of 1950 simply placed in statutory form that interpretation of the 1930 Act, placed thereon by the courts.

At page 14 of its brief Employers asserts that "the courts" promptly held, upon the adoption of the Louisiana Insurance Code (Act 95 of 1948), that the Louisiana legislature intended for the direct action provision of the statute to be applicable only to policies issued and delivered in Louisiana. "The courts" did no such thing. The only court which so held was the Court of Appeals for

the Fifth Circuit in *Belanger v. Great American Indemnity Company, 188 F. 2d 196*, the very court whose ruling is involved in this case, at this time, before this Court. The Louisiana Courts *never* so held.

**Validity of Direct Action Clause**

At page 15 of its brief Employers urges that the only obligation assumed by it in the policy involved in this case was the obligation "to indemnify its insured, the Gillette Company, against losses arising by its own negligence." Employers further urges that since the contract was executed in Massachusetts, the Massachusetts law entered into it.

Employers is primarily in error in asserting that the policy involved here is an indemnity policy. It is not. It is a liability policy. To make this abundantly clear, we quote from the policy (R. 56) the Insuring Agreements, thus:

> "To pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury, sickness or disease, including death at any time resulting therefrom sustained by any person and caused by accident."
>
> • • • •
>
> "Defend any suit against the insured alleging such injury, sickness, disease or destruction and seeking damages on account thereof, even if such suit is groundless, false or fraudulent; but the company may make such investigation, negotiation and settlement of any claim or suit as it deems expedient."

Of course, secondly, Employers is correct that the law of Massachusetts entered into the contract but only in so far as the policy covered and afforded protection in Massachusetts. The law of Louisiana likewise entered into it to the extent that the policy covered and afforded protection to Gillette as to accidents occurring in Louisiana. The same thing is true of the laws of every other state of the union and the law of each of them entered into it to the extent that the policy covered accidents occurring within the boundaries of those states.

In the same paragraph in which the above arguments are advanced by Employers, beginning on page 15 of its brief and continuing on page 16 thereof, the flat assertion is made that the policy of insurance was issued for the protection of the insured and it was not designed for the protection of strangers. To the extent that the policy afforded coverage in Louisiana and covered accidents occurring there, just the opposite is true. It cannot be seriously argued that Louisiana was excluded from coverage of this policy when the policy in so many words provides that it shall apply to accidents occurring anywhere in the United States, nor can it be seriously urged that the parties to the contract contemplated no coverage in Louisiana, since Louisiana accidents were not excluded.

Inasmuch as Gillette and Employers both contracted with the view of liability arising anywhere in the United States, they contracted with the view of coverage in each state and the laws and public policies of the various states in which the policy would be effective. When this

particular policy was issued in 1951 both Employers and Gillette were well aware of the public policies of the various states in which the policy would be effective. In 1942 the Supreme Court of Louisiana in *Davies v. Consolidated Underwriters, 199 La. 459, 6 So. 2d 351* at page 357 of 6 So. 2d held:

> "The statute expresses the public policy of this State that an insurance policy against liability is not issued primarily for the protection of the insured but for the protection of the public."

At page 16 of its brief Employers argues that in view of the fact that the Watsons had not, as required by the no-action clause of the policy, obtained a judgment against Gillette, Gillette itself could not maintain a suit on the contract in Louisiana. That statement is likewise erroneous.

Assuming that the Wastons had instituted this suit solely against Gillette and Gillette had, in accordance with the terms of the policy notified Employers of the institution of the suit and called upon Employers to defend it as its policy provides Employers must do, as will be seen from the quotation from the policy earlier in this brief, and Employers had refused to defend the suit or had otherwise refused to comply with its policy, Gillette could, in the very same suit, sue Employers on the policy. This very contingency is provided for under Louisiana law. Article 378 of the Louisiana Code of Practice provides:

> "The obligation which one contracts to defend another in some action which may be instituted against him is termed warranty. The one who has contracted this obligation is called the warrantor."

Article 379 of the Louisiana Code of Practice provides:

> "Personal warranty is that which takes place in personal actions; it arises from the obligations which one has contracted to pay the whole or a part of a debt due by another to a third person."

Under these provisions of the Louisiana law, in such a situation Gillette could call Employers in warranty and require Employers to defend the suit and at the same time obtain a judgment against Employers for such amount as the Watsons might obtain against Gillette, together with such damages and attorneys' fees as Gillette may have suffered by the refusal of Employers to defend the suit. *Shehee-Ford Wagon & Harness Co. v. Continental Casualty Company, 170 So. 249.*

At page 16 of its brief Employers states that the Watsons assert on pages 3 and 13 of their original brief "that this is not an action on the contract but is actually a *tort action*". Inferentially Employers thereby asserts that this suit is not a *tort* action but is an action *on the contract.* The inference thus sought to be made by Employers is contrary to the established law of Louisiana that this action is a tort action and is not an action on the contract. In *Reeves v. Globe Indemnity Company, 182 La. 905, 162 So. 724,* the Supreme Court held squarely

that a suit for personal injuries directly against the insurer of the tort feasor, as permitted by the statutes under consideration and as was permitted by Act 55 of 1930, then in force, is one ex delicto and is not a suit on the contract.

**Public Policy of Other States**

Beginning on page 17 of its brief and continuing through page 20 Employers asserts that in 44 states of the Union no suits are permitted directly against the insurer; that in those states the no-action clause of a liability policy is legal, and in those states it is error to even mention that the tort feasor is protected by insurance. This assertion is bolstered by quotations from cases arising in some of those states and by reference to a statute of Michigan prohibiting the joinder of the insurer as a party defendant.

We submit that this contention is wholly irrevelant and has no bearing whatever on the questions involved in this case. It is of no moment whatever what the public policy of Michigan might be or the public policy of New Mexico might be but the question here is what is the public policy of Louisiana. We have heretofore shown in the Watsons' original brief and in this brief, that it is the public policy of Louisiana to permit direct actions against the insurer and that is the public policy with which this case is concerned.

We quote the Louisiana court in *Churchman v. Ingram, 56 So. 2d 297*, at page 303 of 56 So. 2d, thus:

"This (the right of direct action) has been held to be an expression of the public policy of this state". Cf. *Davies v. Consolidated Underwriters, 6 So. 2d 351, West v. Monroe Bakery, 217 La. 189, 46 So. 2d 122; Jackson v. State Farm Mutual Automobile Insurance Company, 211 La. 19, 29 So. 2d 177.*

It is argued, beginning at page 21 of Employers' brief, that the real reason for the insertion of a no-action clause in policies of this character, other than to prevent the knowledge of insurance being had by the court or jury, is to insure that ex delicto actions be brought at the domicile of the tort feasor where it will be most convenient to it to defend the suit, irrespective of the convenience of the injured party. Again Employers is in error. Employers and many other liability insurance companies write liability policies in Louisiana and it is the law of Louisiana that suits of this character may be brought either at the domicile of the tort feasor or at the place where the tort occurred. The Louisiana Code of Practice, Article 165 provides as follows:

> "There are other exceptions to this rule which require that the defendant be sued before the judge having jurisdiction over the place of domicil or residence; they are here enumerated."
>
> • • • • •
>
> "In all cases where any person, firm or domestic or foreign corporation shall commit trespass, or do anything for which an action for damage lies or where any domestic or foreign corporation shall fail to do anything for which an action for damage

> lies, such person, firm or corporation may be sued in the parish where such damage is done or trespass committed or at the domicil of such person, firm or corporation."

Cf. *Tripani v. Meraux*, *184 La. 66, 165 So. 453.*

Beginning at the bottom of page 21 of its brief and continuing on page 22, Employers argues that the premiums on its policy which must be paid by Gillette vary with the frequency of accidents and the losses incurred through Gillette's negligence and in some manner deems this truism to have a bearing on the constitutionality of the statutes here in question. While confessing our inability to see any connection between that fact and the question of constitutionality, the weight of the argument is lost when it is remembered that the same thing is true of every liability policy. In all cases of which we are aware insurance companies increase the premiums when the experience of the particular assured has been poor and the insurer has been called upon to pay because of the frequency of accidents.

**Jurisdictional Question**

It is made abundantly clear from the opinion of the Court of Appeals that only Employers and not Gillette is affected by the decision holding the statutes unconstitutional. The Court of Appeals' opinion clearly reveals that Gillette was dismissed from the suit solely upon its objection to the filing of the Watsons' amended complaint seeking to join it as a defendant after removal. The Court of Appeals held squarely that Gillette's dismissal was pre-

dicated upon the District Court's exercise of its sound discretion in refusing to permit its joinder by amendment after removal and that the constitutional question was decided exclusively upon Employers' motions and is exclusively applicable to it.

**Validity of Proviso**

Beginning on page 27 of its brief Employers argues that while the Court of Appeals in this case decreed that portion of the Louisiana statutes involved here permitting direct actions against insurers whether the policy was written and delivered in Louisiana or not, so long as the accident takes place in Louisiana, to be unconstitutional, that decree did not invalidate the statute as a whole.

This is an inconsistent argument because Employers first argues that the Court of Appeals did not hold the statute unconstitutional at all but simply held it not to be applicable to policies issued and delivered outside of Louisiana despite the fact that that provision of the statute is the sole basis of the law suit. In making the argument that the invalidity of the proviso does not affect the statute otherwise, Employers admits that the Court of Appeals did in this case hold the statute unconstitutional. The argument is the same as could be expressed where there is a statute with several provisions which are separable and with a saving clause that the unconstitutionality of one section should not affect the remaining sections. In the present case the sole foundation of this suit is the provision of the statute (Act 541 of 1950) which was held to be unconstitutional by the Court of Appeals.

Futher in this connection Employers insists that the constitutional proviso is in reality no law and is a mere llity. That is begging the question because the proviso questionably stands until the Supreme Court of the ted States decrees it to be unconstitutional.

**Questions Presented for Review on the Merits**

Employers at page 32 of its brief poses the questions sented for review. It poses the questions under its ory that the policy of insurance involved here permits formance in Massachusetts and Illinois and nowhere . We believe it has been demonstrated earlier in this f and in the Watsons' original brief that performance no means is limited to Massachusetts and Illinois performance is to take place in Louisiana and in every er state in which Gillette commits a negligent act re- ing in injury to others. Under this heading at page of its brief Employers reasserts that the policy is an emnity policy. We again repeat that the policy is not indemnity policy but is a liability policy. The differ- between an indemnity policy and a liability policy f some importance and for a full and thorough discus- of these differences we respectfully refer the Court Appleman's Insurance Law and Practice, particularly . 7, Sec. 4261, pages 20-27 and Vol. 8, Sec. 4831, pages -222.

It has further been held that the presence of a "no- ." clause" in a liability policy does not change that cy from a liability policy to an indemnity policy. *eral Casualty Company v. Larson*, 196 F. 2d 170, 173.

In the cited case the Court said:

> "This is not an action for 'indemnity', and the 'No action' clause in the policy does not make it so. This is an action upon the liability contract of the policy whereby the appellant became 'obligated to pay by reason of the liability imposed upon the Insured by law."

Likewise on page 33 of its brief Employers argues that in view of the fact that the policy was written in Massachusetts and delivered to the insured in Illinois that fact alone indicates that the contracting parties contemplated that the contract would be governed by the laws of Massachusetts. That contention is best answered by the ruling of this Court in *Hoopeston Canning Company v. Cullen, 318 U.S. 313, 87 L. ed. 777, 63 S. Ct. 602*, where at page 782 of 87 L. Ed., page 317 of 318 U.S., the Court said:

> "The actual physical signing of contracts may be only one element in a broad range of business activities. Business may be done in a state although those doing the business are scrupulously careful to see that not a single contract is ever signed within that state's boundaries. Important as the execution of written contracts may be, it is ordinarily but an intermediate step serving to tie up prior business negotiations with future consequences which themselves are the real object of the business transaction."

A further weakness in such an argument is that Gillette could have just as easily purchased the policy, and

the identical policy, in Louisiana. Employers is authorized to do and does business in Louisiana. Had Gillette so desired this identical policy could have been purchased from Employers in Louisiana. Had that fact taken place, to follow Employers' argument, it is a logical conclusion that such a purchase would have imposed the law of Louisiana upon every other state. Under Employers' argument had an individual been injured because of harmful ingredients in a Toni set in Boston, Massachusetts, that person could have sued Employers directly in Massachusetts without joining Gillette because of the law of Louisiana permitting a direct action against the insurer without joining the insured, and, according to Employers' argument, this provision of the law of Louisiana, because of the mere fact that the policy was ordered and typed in Louisiana, would have transplanted the law of Louisiana to Massachusetts and required Massachusetts to apply it even though it was against the public policy of Massachusetts to permit direct actions against the insurer.

At page 34 of its brief Employers cites *Allgeyer v. State of Louisiana, 165 U.S. 578, 41 L. Ed. 832, 17 S. Ct. 427* and *St. Louis Cotton Compress Co. v. Arkansas, 260 U.S. 346, 67 L. Ed. 297, 43 S. Ct. 125.* Since St. Louis Cotton Compress Co. v. Arkansas was bottomed exclusively on Allgeyer v. State of Louisiana, the two cases may be considered together.

What this Court had to say with regard to the holding in Allgeyer in its decision in Hoopeston Canning

Co. v. Cullen, supra, expresses the views of appellants better than we can. There this Court (page 783 of 87 L. Ed., page 319 of 318 U.S.) had this to say:

> "While the wisdom of the Allgeyer Case has occasionally been doubted, it is in any case clearly distinguishable here. In that case, no act was done in the state of Louisiana except that of mailing a letter advising the insurance company of a shipment of goods, the goods themselves were in the state only temporarily, and the insurance company never purported to do business in the state. In the instant case, the reciprocals have the many actual contacts with the New York subscribers and the New York property outlined above, much of the insurance covers permanent immovables, and the reciprocals have been licensed to do business there for years. The Allgeyer and subsequent insurance cases have been recently considered in Griffin v. McCoach, supra (313 US at 506, 507, 85 L ed 1486, 1487, 61 S Ct 1023, 134 ALR 1462) and in Osborn v. Ozlin, 310 US 53, 66, 84 L ed 1074, 1079, 60 S Ct 758; as the analysis in those opinions clearly indicates, the Allgeyer line of decisions cannot be permitted to control cases such as this, where the public policy of the state is clear, the insured interest is located in the state, and there are many points of contact between the insurer and the property in the state."

Following the citation of Allgeyer and St. Louis Cotton Compress Co., Employers cites *New York Life Insurance Co. v. Head, 234 U.S. 149, 58 L. Ed 1259, 34 S. Ct. 879* and *Aetna Life Insurance Co. v. Dunken, 266 U.S. 389, 69 L. Ed. 342, 45 S. Ct. 129*, and, further in its

brief cites *Hartford Accident & Indemnity Co. v. Delta & Pine Land Co. 292 U.S. 143, 78 L Ed. 1178, 54 S. Ct. 634.* These cases and those like them were distinguished from cases of the character of the one at bar by this Court itself in Griffin v. McCoach. The Supreme Court beginning at page 1487 of 85 L. Ed., page 507 of 313 U.S., effectively distinguished and differentiated those cases cited by Employers from cases like the present one. No good purpose would be served by adding further distintions to those already pointed out by the Court in Griffin v. McCoach, supra.

At page 36 of its brief Employers argues that when Congress enacted the McCarran Act (15 U.S.C. 1011-1015) Congress did not intend to clothe the states with any power to regulate the insurance business beyond that which the states previously possessed. From this Employers argues that in view of the McCarran Act having been passed in 1945 and the Acts in contest here have been passed in 1950 necessarily Louisiana attempted to exert power in 1950 that it did not have prior to 1945. We have already demonstrated the fallacy of this argument earlier in this brief wherein it was shown that not only did Louisiana have this power before 1945 but exercised it by passage of Act 55 of 1930, as Robbins v. Short, 165 So. 512, clearly shows.

Beginning on page 38 of its brief and continuing through page 45 Employers argues that under *Hartford Accident and Indemnity Co. v. Delta Pine Land Co.*, supra, *Home Indemnity Co. v. Dick, 281 U.S. 397, 74 L. Ed. 926*

and *Pritchard v. Norton, 106 U.S. 124, 27 L. Ed 104, 1 S. Ct. 102* and like cases, Employers is deprived of its property without due process of law. Most of the cases so cited by Employers have been, as previously stated, distinguished by this Court in Griffin v. McCoach, supra.

However, Pritchard v. Norton is authority for the Watsons and is authority against the contentions of Employers. In that case the argument made by Norton and discarded by the Court was the same as that made by Employers here. There the argument was:

> "The argument in support of the judgment is simple and may be briefly stated. It is, that New York is the place of the contract, both because it was executed and delivered there, and because, no other place of performance being either designated or necessarily implied, it was to be performed there."
>
> (page 105 27 L. Ed, page 129 of 106 U.S.).

The argument so advanced was rejected by the Court. In that case it was contended that since the contract was executed and delivered in New York the law of New York must prevail over that of Louisiana where the contract was to be performed, just as in this case performance under the policy took place in Louisiana whenever a claim arose under the policy in Louisiana.

Beginning at page 42 of its brief Employers asserts that the contracting parties to the contract acted in good faith and intended that the contract should be governed by the law of Massachusetts. Without impugning the good faith of the parties at all there is nothing whatever

to indicate that the parties contracted with the view of having the contract governed by the laws of Massachusetts. There is nothing within the four corners of the contract so indicating. On the contrary, a reading of the contract indicates that it was the intention of the parties for the contract to be governed by the laws of each state where performance would be required. Nevertheless, if the parties contracted with the view of imposing the law of Massachusetts on the other 47 states of the United States and on Canada and Newfoundland, the laws and public policies of these other states and countries may not be so highhandedly subordinated to the law of Massachusetts by the action of two private corporations. Robertson vs. California, 328 U.S. 440, 90 L. Ed. 1366, 66 S. Ct. 1160.

At page 44 of its brief Employers states that "when issued, the contract was not subject to Louisiana law". It was pointed out in the Watsons' original brief that when the contract was issued the statutes in question were the law of Louisiana and when the contract was issued and performance contemplated in Louisiana it was subject to Louisiana law. See page 17 of original brief. Further in this connection Employers argues that since Act 541 of 1950 does not recognize a right of action on a policy issued outside of the state until an accident occurs in Louisiana, necessarily the contract was not to be effective in Louisiana, or differently stated, performance was not to be in Louisiana. No contract ripens until the obligation thereof matures and in this respect an insurance contract is no different from any other. Neither party to a contract may sue upon it until the obligation matures and

obviously no suit may be maintained upon an insurance contract until one of the risks contemplated by the policy comes into being.

**Constitutionality of Act 542 of 1950**

Even though the Watsons conceded that while under Act 542 of 1950 Employers was required to consent in writing that it could be sued directly on all policies whether written in Louisiana or not on accidents occurring in Louisiana, that statute was of no particular importance in view of the provisions of Act 541 of 1950. Nevertheless, Employers argues the unconstitutionality of this Act at pages 46 through 48 of its brief.

Despite Employers contention that the Court of Appeals held neither Acts 541 nor 542 unconstitutional but held that they were inapplicable, there is no escape from the fact that Employers did sign the consent to be sued required by Act 542. It is obvious, without laboring the point, that the only way in which Employers may avoid the effect of its compliance with the Act and the fact that it did sign the consent is for the Court to hold that its consent was coerced by an unconstitutional statute. In other words, it appears clear that since Employers complied with the statute, its compliance may only be avoided by a holding by this Court that its compliance is ineffective because that compliance was given through the compulsion of an unconstitutional statute. Unless that particular statute is decreed to be unconstitutional, then Employers is bound by its written consent. Thus it will be seen that by this argument Employers has shown most

clearly that the constitutionality of a state statute is involved and that this Court has jurisdiction on appeal.

**Louisiana Direct Action Statute is Procedural**

Beginning at page 51 and continuing through the major portion of page 54 of its brief Employers contends that the direct action statutes of Louisiana are not procedural and takes issue with appellants' position that they are.

On page 52 of Employers brief it is stated that the latest expression on the subject by the Louisiana courts is to be found in *West v. Monroe Bakery, 217 La. 189, 46 So. 2d 122.* Aside from the fact that this case is *not* the last expression of the Louisiana courts, even it does not support Employers' position.

While it is true that the court in that case stated that Act 55 of 1930 confers substantive rights the court did not use the word "substantive" in the sense contended for by Employers. What the court meant by the word "substantive" as used in that decision was an alternative to "valuable". It appears clear from a reading of the West decision that the court was using the word substantive in the sense that the statute conferred a right on an injury party which was of substantial value. The use of the word by the court in that case was comparable to the remedy provided by the death statute of Louisiana in that a cause of action for wrongful death exists which is a substantial right and that once that right accrues it cannot be defeated by a repeal of the remedy to enforce the statute. It was in that sense and that sense only that

the word was used and not in the sense that the statute itself was not a procedural statute. In truth, the latest cases on the subject are *Home Indemnity Co. v. Highway Insurance Underwriters, 222 La. 540, 62 So. 2d 828* and *Churchman v. Ingram, 56 So. 2d 297.*

West v. Monroe Bakery was decided in March, 1950. Churchman v. Ingram was decided in December, 1951 and Home Indemnity Company v. Highway Insurance Underwriters was decided in December, 1952.

It so happens that in Churchman v. Ingram, supra, the same contentions raised by Employers in this case were passed upon by the Court contrary to Employers' contentions and the court held the statutes in question to be constitutional. The reasoning of the court, we submit, is sound.

The Supreme Court in Home Indemnity Company v. Highway Insurance Underwriters, supra, in referring to these statutes and in stating that they are procedural, spoke as follows:

> "It is manifest that both of these acts treat of provided remedies and not of contractual obligations; they are not restrictions of rights of action but are remedial enlargements and remedies of procedure to better insure recovery for an injured person, or a person suffering property damage. The Legislature evidently felt that our courts should not be made to become circumlocution officers winding and unwinding red tape, but felt that the nearest point to a given object was a straight line-it en-

> acted the provision of a direct action and with due care gave an interpretation of the provisions of Act No. 55 of 1930, as amended, when it expressed its *intent* as to the limitation of the scope of operation on the remedial act." (p. 831 of 62 So. 2d).

Both the Supreme Court of Mississippi and the Court of Appeals for the Fifth Circuit, sitting as a Texas Court in a diversity case, have considered the Louisiana direct action statute and held it to be procedural, following the Louisiana courts on the subject. See *McArthur v. Maryland Casualty Co., 184 Miss. 663, 186 So. 305*, and *Wells v. American Employers Ins. Co., 132 F. 2d 316.*

In the Mississippi case of McArthur v. Maryland Casualty Company, supra, the Court, in considering statutes of Rhode Island and Wisconsin, similar to the Louisiana statutes, concluded from an examination of the decisions of the courts of those states, that the statutes of those states are likewise procedural. The Court, at page 307 of 186 Southern, stated:

> ". . . . the courts of those states (Rhode Island and Wisconsin) have likewise construed the provisions thereof to be procedural and remedial only."

The Watsons are criticized for stating on pages 8, 9, 12 and 25 of their original brief that the Louisiana courts have "consistently" and "without" exception held that the direct action action statutes are procedural. That statement was made advisedly and it is true. The only conceivable exception is West v. Monroe Bakery, supra, and when that case is read in the light of its facts

it is readily seen, as above pointed out, that the word "substantive" was not used in the sense contended for by Employers, but as synomyous with "substantial". That this is true is demonstrated by the decision of the Louisiana Court of Appeal in Churchman v. Ingram, supra, which was decided after West v. Monroe Bakery and before Home Indemnity Co. v. Highway Insurance Underwriters. The Court of Appeal obviously did not consider West v. Monroe Bakery as holding that the statutes were substantive legislation.

If the Watsons are wrong in this interpretation, nevertheless West v. Monroe Bakery is no longer the law because if it can be considered as a holding that the statutes are substantive legislation, it is in direct conflict with the later decision of the Supreme Court of Louisiana in Home Insurance Co. v. Highway Insurance Underwriters, supra. It must be considered repudiated by the later decision.

On page 53 of its brief Employers argues that considering West v. Monroe Bakery as the latest expression of the State Court, it was the law when the present case was decided by the District Court. Employers says that since West vs. Monroe Bakery was the law at that time, despite the fact that the Supreme Court of Louisiana in the Home Indemnity Company Case decided differently in December 15, 1952, the Court of Appeals in the present case was bound to affirm the District Court decision, based as it was, so Employers contends on West v. Monroe Bakery which it says was the law when the District Court

case was decided, even though the Home Indemnity Company case was decided before the Court of Appeals decided the present case on February 27, 1953 after the decision of the Supreme Court of Louisiana in the Home Indemnity Company case which was decided December 15, 1952.

Once again Employers is in error. The correct rule of decision has been handed down by this Court in *Huddleston v. Dwyer, 322 US 232, 88 L. Ed. 1246, 64 S. Ct. 1015.* In that case the Supreme Court of the United States said:

> "It is the duty of the federal appellate courts, as well as the trial court, to ascertain and apply the state law where, as in this case, it controls decision. Meredith v. Winter Haven, 320 US 228, ante, 9, 64 S. Ct. 7. And a judgment of a federal court ruled by state law and correctly applying that law as authoritatively declared by the state courts when the judgment was rendered, must be reversed on appellate review if in the meantime the state courts have disapproved of their former rulings and adopted different ones."
>
> (p. 1249 of 88 L. Ed., p. 236 of 322 U.S.).

Precisely in point on this issue is *Vandenbark v. Owens-Illinois Glass Company, 311 US 538, 85 L. Ed. 327, 61 S. Ct. 347.* There the question was:

> "This certiorari brings before us for review the determination of the Circuit Court of Appeals that cases at law sounding in tort, brought in the federal courts on the ground of diversity of citizenship, are ruled by the state law as declared by the state's highest court when the judgment of the trial court

> is entered and not by the state law as so declared . . at the time of entry of the appellate court's order of affirmance or reversal."
>
> (p. 327 of 85 L. Ed., p. 538 of 311 U.S.).

The question was answered precisely as it was in *Huddleston v. Dwyer*, supra; precisely as the Watsons contend and exactly contrary to Employers' position.

**Louisiana Direct Action Statute is not Unique.**

Beginning on page 54 and continuing through page 55 Employers contends that the Louisiana direct action statute is unique and that Louisiana is "the *only* state which has a statute permitting the injured person to file a direct action at law, against a liability insurer alone, where the policy was voluntarily obtained by the insured." This statement is not only misleading but is entirely erroneous.

Wisconsin, at least, has a similar statute. In *Tillman v. Great American Indemnity Co., 207 F. 2d 588* at page 590 the Court of Appeals for the 7th Circuit in deciding a case involving Wisconsin law stated that under Wisconsin law the plaintiff could bring the action against the insurance company without joining the insured. The court there said:

> "Under Wisconsin law plaintiff could and did bring the action against the insurance company without joining the driver of the automobile as a party defendant. Secs. 85.93 and 260.11, Wis. Stats.; Elliott v. Indemnity Insurance Co. of North America, 201 Wis. 445, 230 N.W. 87."

Employers further argues that there is something sacred about an insured *voluntarily* obtaining a liability policy. The significance of such an argument is entirely lost when it is borne in mind, even under the law of states requiring liability insurance, that the insurance company still is the one which *voluntarily* writes the policy. Even in states having statutes requiring owners of automobiles to carry liability insurance there is nothing in those statutes requiring any particular company to write the insurance. It still remains with the individual insurance company to write the policies or not. It is entirely voluntary with each individual company whether it will assume a risk. This is made manifest by the decision of the Supreme Court in *Merchants Mutual Automobile Liability Ins. Co. v. Smart, 267 U.S. 126, 69 L. Ed 538, 45 S. Ct. 320*, where the Court said at page 542 of 69 L. Ed, page 130 of 267 U.S.:

> "It is to be remembered that the assumption of liability by the Insurance Company under § 109 is entirely voluntary. It need not engage in such insurance if it chooses not to do so."

When it is borne in mind that the question of voluntary issuance of the policy rests with the insurer the decision of the District Court in *Boyles v. Farmers Mutual Hail Insurance Co., 78 F. Supp. 706* is pertinent.

There at page 709 the Court said:

> "That the insurance carrier may be joined in an action without impleading the insured is established by several Kansas cases, inter alia, Dunn v. Jones,

supra; Meyer Sanitary Milk Co. v. Casualty Reciprocal Exchange, 145 Kan. 501, 66 P. 2d 619; Farmer v. Central Mutual Ins. Co., 145 Kan. 951, 67 P. 2d 511; State Highway Commission v. American Mutual Liability Ins. Co., 146 Kan. 187, 70 P. 2d 20; and Hudson v. Ketchum, 156 Kan. 332, 133 P. 2d 171." (p. 709-710).

Likewise pertinent is the Georgia law (Geo. Code of 1933, par. 68-612) where it is provided that as to common carriers "it shall be permissable to join the motor carrier and the insurance carrier in the same action whether arising in tort or contract." *Acme Freight Lines v. Blackman, 131 F. 2d 62.*

**Conflict of Law Questions**

It is urged by Employers that the Watsons are in error in their contention that a federal court sitting in Louisiana in diversity cases is bound by the Louisiana conflict of laws rules. Employers has been answered by the Supreme Court of the United States. In *Klaxon Co. v. Stentor Electric Mfg. Co., 313 U.S. 487, 85 L. Ed 1477, 61 S. Ct. 1020*, the Court held:

"We are of the opinion that the prohibition declared in Erie R. Co. v. Tompkins, 304 US 64, 82 L. Ed 1188, 58 S. Ct. 817, 114 ALR 1487, against such independent determinations by the federal courts extends to the field of conflict of laws. The conflict of laws rules to be applied by the federal court in Delaware must conform to those prevailing in Delaware's state courts. Otherwise the accident of diversity of citizenship would constantly disturb equal administration of justice in co-ordinate state

and federal courts sitting side by side. See Erie R. Co. v. Tompkins, supra, at 74-77. Any other ruling would do violence to the principle of uniformity within a state upon which the Tompkins decision is based. Whatever lack of uniformity this may produce between federal courts in different states is attributed to our federal system, which leaves to a state, within the limits permitted by the Constitution, the right to pursue local policies diverging from those of its neighbors. It is not for the federal courts to thwart such local policies by enforcing an independent 'general law' of conflict of laws. Subject only to review by this Court on any federal question that may arise, Delaware is free to determine whether a given matter is to be governed by the law of the forum or some other law. Cf. Milwaukee County v. M. E. White Co., 296 US 268, 272, 80 L ed 220, 225, 56 S Ct 229. This Court's views are not the decisive factor in determining the applicable conflicts rule. Cf Funkhouser v. J. B. Preston Co. 290 US 163, 78 L ed 243, 54 S Ct 134. And the proper function of the Delaware federal court is to ascertain what the state law is, not what it ought to be." (P. 1480 of 85 L. Ed., p. 496 of 313 U.S.).

In *Griffin v. McCoach, 313 U.S. 498, 85 L. Ed 81, 61 S. Ct. 1023*, this Court said:

"We are of the view that the federal courts in diversity of citizenship cases are governed by the conflict of laws rules of the courts of the states in which they sit." (p. 1485 of 85 L. Ed., p. 503 of 313 U.S.).

In *Magnolia Petroleum Company v. Hunt, 320 S. 430, 88 L. Ed. 149, 64 S. Ct. 208*, the Court said:

"In the case of local law, since each of the states of the Union has constitutional authority to make its own law with respect to persons and events within its borders, the full faith and credit clause does not ordinarily require it to substitute for its own law the conflicting law of another state, even though that law is of controlling force in the courts of that state with respect to the same persons and events." (p. 154 of 88 L. Ed., p. 436 of 320 U.S.).

In *Guaranty Trust Co. v. York, 326 U.S. 99, 89 L. Ed. 2078, 65 S. Ct. 1464*, the Court said:

"And so, putting to one side abstractions regarding 'substance' and 'procedure', we have held that in diversity cases the federal courts must follow the law of the State as to burden of proof, Cities Serv. Oil Co. v. Dunlap, 308 US 208, 84 L ed 196, 60 S Ct 201 as to conflict of laws, Klaxon Co. v. Stentor Electric Mfg. Co., 313 US 487, 85 L. ed 1477, 61 S. Ct. 1020, as to contributory negligence, Palmer v. Hoffman, 318 US 109, 117, 87 L ed 645, 651, 63 S Ct 477, 144 ALR 719." (2086 of 89 L. Ed., p. 109-110 of 326 U.S.).

In *Welle v. Simonds Abrasive Co., 345 U.S. 514, 97 L. Ed. 1211, 73 S. Ct. 856*, this Court in dealing with the conflict of laws question had this to say:

"The Full Faith and Credit Clause does not compel a state to adopt any particular set of rules of conflict of laws; it merely sets certain minimum requirements which each state must observe when asked to apply the law of a sister state." (p. 1215 of 97 L. Ed., p. 516 of 345 U.S.).

See also *Pink v. A.A.A. Highway Express, Inc., 314 U.S. 201, 86 L. Ed. 152, 62 S. Ct. 241* and *Angel v. Bullington, 330 U.S. 183, 91 L. Ed. 832, 67 S. Ct. 657.*

It is the duty of a Federal Court after determining the conflict of laws rule of the state to set that rule at naught only when it is found that the rule is arbitrary and unreasonable and for that reason is thus in conflict with the United States Constitution. It is submitted that there is nothing arbitrary or unreasonable in the characterization of the questioned statutes by the Louisiana courts in determining the appropriate law to be applied to this case.

**Public Policy of Louisiana**

It has been pointed out earlier in this brief that the courts of Louisiana have unmistakably stated the public policy of Louisiana to be that a direct action may be maintained on a liability insurance policy; that these policies are written for the benefit of the injured party and not for the benefit of the insured in the primary sense.

The police power of the state enables it to regulate its public policy. The police power is restricted by constitutional bounds only and is unlimited otherwise. The police power is not a fixed condition but is the operation of social, economic and political conditions. As long as these conditions vary the police power must continue to be elastic and capable of development. The police power aims directly to secure and protect the public's welfare and it does so by restraint and compulsion.

A good example of the flexible police power vested in the states is illustrated in *Young v. Masci, 289 U. S. 253, 77 L. Ed. 1158, 53 S. Ct. 599.* In that case, Young, citizen of New Jersey, loaned an automobile to another in New Jersey with permission either expressed or implied to drive the car into New York. A New York statute made the owner of the car liable for the driver's negligence when used with his permission. The driver of Young's car had an accident in New York and the injured party brought suit in New Jersey. Under the law of New Jersey, Young had no liability. The Supreme Court said:

> "Moreover, the contract of bailment could not have conferred upon the owner immunity from liability to third persons for the driver's negligence. Liability for a tort depends upon the law of the place of the injury; and (apart from the effect of the full faith and credit clause, which is not here involved) agreements made elsewhere cannot curtail the power of a State to impose responsibility for injuries within its borders." (P. 1160 of 77 L. Ed, p. 258 of 289 U.S.)

Further in the same case, on the same page, the Court said:

> "When Young gave permission to drive his car to New York, he subjected himself to the legal consequences imposed by that State upon Balbino's negligent driving as fully as if he had stood in the relation of master and servant. A person who sets in motion in one State the means by which injury is inflicted in another may, consistently with the due process clause, be made liable for that injury

> whether the means employed be a responsible agent or an irresponsible instrument. The cases are many in which a person acting outside the State may be held responsible according to the law of the State for injurious consequences within it."

At pages 58-61 Employers endeavors to distinguish the cases of this Court cited by and relied upon by the Watsons in their original brief. The effort is a distinct failure, since these cases are most appropriate. In passing, however, it is necessary to here note Employers' criticism of Hoopeston Canning Co. v. Cullen, 318 U.S. 313, 87 L. Ed. 777, 63 S. Ct. 602.

Employers urges that the distinction between that case and this one is that Hoopeston concerned *immovables*. The distinction is one without a difference. While immovables were involved in the case, the decision was not based upon that fact. Furthermore, it is most inappropriate for Employers to urge upon this Court that real property is entitled to greater consideration than human health and human life and that this Court has and should place property rights above human well being and give property rights a preferred status.

In conclusion, it is interesting to note the same Court, the United States District Court for the Western District of Louisiana, which decided the case now before the Court, through another of its judges, held the very statutes in controversy here, to be constitutional in, we submit, a well reasoned and correctly decided opinion. See *Baxton v. Midwest Ins. Co., 102 F. Supp. 500.*

## CONCLUSION

It is respectfully submitted that the Louisiana statutes in question are constitutional and constitute a valid exercise of the state's police power. We further submit that the decree of the Courts below should be reversed, the statutes held to be constitutional and the case remanded to the District Court for further proceedings.

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